

A Gnanasegaran a/l Pararajasingam v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO
W-09-5 OF 1995

B SHAIK DAUD, MAHADEV SHANKAR JJCA AND ABDUL MALEK
 AHMAD J
 25 OCTOBER 1995

C *Evidence — Documentary evidence — Computer printout — Admissibility —*
Whether computerized evidence of bank transactions admissible — Person in
charge of the transactions was called to give evidence on printout tendered in court
— Whether incumbent upon prosecution to produce a certificate signed by person in
D *charge of the computer which produced the printout — Whether failure to produce*
certificate was fatal and would render the computer printout inadmissible and the
evidence of the witness hearsay — Evidence Act 1950 s 90(A)

E *Legal Profession — Practice of law — Maintenance of a client's account — Use of*
client's money to settle a solicitor's liability to another client — Whether client's
money lost its identity when it merged with money already in the client account —
Whether client could be paid with money from any number of client accounts —
Solicitors' Account Rules 1978 rr 3(2) & 7(a)(i)

F The appellant, an advocate and solicitor, was hired by the complainant
following the death of her husband in a car accident to act for her deceased
husband's estate. He accepted money totalling RM6,576.16 from the estate
(‘the EPF money’), and an additional RM133,000 from the insurance
company. The money received by the appellant in trust for the complainant
G and the beneficiaries was put into two accounts the appellant opened up at the
United Asian Bank. One account was a client's account, the other an office
account. The accounts were later closed, as the appellant had written several
bad cheques on both accounts. When the accounts were closed, only RM39.69
and RM401.02 were left in the accounts. The complainant later charged the
H appellant for misappropriating the funds. The appellant was charged with two
counts of criminal breach of trust. The prosecution led evidence, both
documentary and oral, to show the opening of the accounts, and the
movement of money therein. Oral evidence was provided by Zainal Abidin bin
Mohamed (‘Zainal’), who at the time the transactions occurred was in charge
I of operations of current accounts of the bank. Documents relied upon
included computerized records generated by the bank's computers. The
appellant's solicitor's conducted a very brief cross-examination of Zainal. The
sessions court found the appellant's defence lacked credibility and that there
was ample evidence to show his misappropriation of the money. The argument

that the appellant was awaiting the sealed copy of the distribution order from the court was no defence, as the money had been dissipated before the appellant even applied to the court for the order. Consequently, the sessions court convicted the appellant and sentenced him on the first count to imprisonment for 12 months and on the second count to imprisonment for 18 months. The appellant's appeal to the High Court was dismissed and the High Court purporting to act on its own volition under the provisions of s 322 of the Criminal Procedure Code (FMS Cap 6) ('the CPC') ordered the appellant to pay RM10,000 as costs in default of which he shall suffer an additional imprisonment of 12 months. The appellant appealed, arguing that Zainal's evidence was not admissible because s 90A of the Evidence Act 1950 required that in the case of computerized records, a certificate had to be produced to authenticate the records.

Held, dismissing the appeal:

- (1) (Per **Shaik Daud JCA**) Section 90A of the Evidence Act 1950 makes computerized records made in the course of its ordinary use admissible if the following is proven, ie that: (i) the documents were produced by a computer; and (ii) the computer records are produced in the course of its ordinary use. Proof can either be by a certificate signed by someone solely in charge of the computer which produced the printout as required by s 90A(2), or by an officer of the bank. In this case, Zainal was able to testify with regard to the documents because he was in charge of the operations of current accounts.
- (2) Moreover, as the appellant did not challenge Zainal's evidence by way of cross-examination, the prosecution succeeded in proving that the documents were admissible. Since the appellant relied solely on this one ground of appeal, there was no merit in the appellant's arguments that the whole of Zainal's evidence should be rejected. There was more than ample evidence to find misappropriation and the appellant was rightly convicted (see pp 11B—I and 12A—B).
- (3) (Per **Shaik Daud JCA**) As for the order which the High Court made on its own volition in ordering the appellant to pay RM10,000 costs in default of which he was to be imprisoned for a further 12 months, it was unfortunate that the learned judge did not mention under which provision of the law he purportedly made the order, nor did he mention to whom should these costs be paid. In the light of s 322(3) of the CPC, this additional order was not justified, and therefore should be set aside (see p 12B—C).
- (4) (Per **Mahadev Shankar JCA**) Zainal was not challenged by the appellant on the accuracy of the entries of the documents produced. Rather, the appeal was based on the fact that no certificate was produced under s 90A(2) which, the appellant argued, meant that the prosecution failed to

- A prove its case. This argument was fallacious, as Zainal was in charge of all the operations at the bank and was therefore responsible for the conduct of the activities of the bank for which that computer was used. If he chose to provide a certificate, he could have, and under s 90A(2), the documents would have been admitted into evidence as provided by s 90A(1). The viva voce evidence of the man in the witness box counts for more than a certificate issued by him (see p 13G—I).
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- (5) (Per **Mahadev Shankar JCA**) Section 90A(1) is an updating of the 'best evidence rule' with the realities of the electronic age, and now it is no longer necessary to call the actual teller or bank clerk who keyed in the data provided he did so in the course of ordinary use of the computer (see p 14A—D).
- C
- (6) (Per **Mahadev Shankar JCA**) The appellant's submission that the client's money lost its identity when it merged with money already in the client account, and thus the complainant could be paid with money from any number of client accounts was fallacious. The Solicitors' Account Rules 1978 r 3(2) permits a solicitor to maintain more than one client's account, but r 7(a)(i) permits the withdrawal of a client's money 'for the payment to or on behalf of *the* client'. Hence, any money put into the account could only be withdrawn to pay the complainants or to their order. To use the client's money to settle a solicitor's liability to some other client is a criminal offence (see pp 15D—E, I and 16A).
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[Bahasa Malaysia summary]

- F Perayu, seorang peguambela dan peguamcara, telah digajikan oleh pengadu berikutan kematian suaminya dalam suatu kemalangan kereta untuk bertindak bagi pihak harta pusaka si mati. Beliau telah menerima wang sebanyak RM6,576.16 dari harta pusaka ('wang KWSP'), dan tambahan sebanyak RM133,000 daripada syarikat insurans. Wang yang diterima oleh perayu atas amanah untuk pengadu dan benefisiari-benefisiari diletak dalam dua akaun yang dibuka oleh perayu di United Asian Bank. Satu akaun adalah akaun klien, manakala yang satu lagi adalah akaun pejabat. Akaun-akaun ini kemudiannya ditutup, kerana perayu telah menulis beberapa cek yang tidak elok atas kedua-dua akaun. Apabila akaun-akaun ditutup, cuma RM39.69 dan
- G RM401.02 yang tinggal dalam akaun tersebut. Pengadu kemudiannya mendakwa perayu melesapkan wang itu. di bank itu pada masa transaksi-transaksi berlaku. Dokumen yang digunakan termasuk rekod komputer yang dijanakan oleh komputer bank. Peguamcara perayu menjalankan pemeriksaan balas yang ringkas atas Zainal. Dalam pembelaannya, perayu memilih untuk memberikan satu pernyataan bertulis dalam Tkandang saksi. Dia menyatakan bahawa dia berhak kepada RM10,000 sebagai kos yang dipersetujui, dan bahawa wang KWSP telah tersilap dikreditkan ke dalam akaun pejabatnya dan bukan ke dalam akaun klien. Dia juga mempersoalkan amaun-amaun. Dia selanjutnya berhujah bahawa dia
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- I

tidak membuat bayaran kepada klien kerana dia tengah menunggu salinan perintah pengagihan bermeterai daripada mahkamah. Mahkamah sesyen mendapati bahawa pembelaan perayu kekurangan kebolehpercayaan dan adanya banyak keterangan bagi menunjukkan pelepasan wang itu olehnya. Hujah bahawa perayu tengah menunggu salinan perintah pengagihan bermeterai daripada mahkamah bukanlah pembelaan, kerana wang telah dilesapkan sebelum perayu memohon kepada mahkamah untuk perintah itu. Berikutnya, mahkamah sesyen menyabitkan perayu dan menjatuhkan hukuman pemenjaraan selama 12 bulan atas kesalahan pertama dan pemenjaraan selama 18 bulan atas kesalahan kedua. Rayuan perayu kepada Mahkamah Tinggi ditolak dan Mahkamah Tinggi yang kononnya bertindak atas kerelaan sendiri di bawah peruntukan s 322 Kanun Acara Jenayah (NMB Bab 6) ('KAJ') memerintahkan perayu supaya membayar RM10,000 sebagai kos dan jika ingkar dia akan dikenakan hukuman pemenjaraan tambahan selama 12 bulan. Perayu membuat rayuan, menghujahkan bahawa keterangan Zainal tidak boleh diterima kerana s 90A Akta Keterangan 1950 menghendaki bahawa dalam kes rekod komputer, suatu sijil haruslah dikemukakan bagi mengesahkan ketulenan rekod-rekod.

Diputuskan, menolak rayuan:

- (1) (Oleh **Shaik Daud HMR**) Seksyen 90A Akta Keterangan 1950 menjadikan rekod komputer yang dibuat semasa penggunaan biasa boleh diterima jika yang berikut dibuktikan, iaitu bahawa: (i) dokumen-dokumen dihasilkan oleh sebuah komputer; dan (ii) rekod komputer dihasilkan semasa penggunaan biasa. Bukti boleh dikemukakan sama ada dalam bentuk sijil yang ditandatangani oleh satu-satunya orang yang bertanggungjawab tentang komputer yang menghasilkan cetakan sebagaimana yang dikehendaki oleh s 90A(2), atau oleh seorang pegawai bank. Dalam kes ini, Zainal boleh memberi keterangan berhubung dengan dokumen-dokumen kerana dia adalah bertanggungjawab atas pengendalian akaun semasa.
- (2) Tambahan pula, oleh kerana perayu tidak mencabar keterangan Zainal menerusi pemeriksaan balas, pihak pendakwa berjaya dalam membuktikan bahawa dokumen-dokumen adalah boleh diterima. Oleh kerana perayu bergantung semata-mata kepada alasan penghakiman tunggal ini, tiada merit dalam hujah perayu bahawa keseluruhan keterangan Zainal patut ditolak. Terdapat keterangan yang lebih daripada mencukupi untuk mencapai pendapat pelepasan dan perayu disabitkan dengan betulnya (lihat ms 11B—I dan 12A—B).
- (3) (Oleh **Shaik Daud HMR**) Berkaitan dengan perintah yang dibuat oleh Mahkamah Tinggi atas kerelaan sendiri dalam memerintahkan perayu membayar RM10,000 kos dan jika ingkar dia akan dipenjarakan selama 12 bulan lanjut, adalah dikesali bahawa hakim yang arif tidak menyebut

- A di bawah peruntukan yang manakah beliau membuat perintah itu, dan beliau juga tidak menyebut kepada siapakah kos-kos harus dibayar. Memandangkan s 322(3) KAJ, perintah tambahan ini tidak berjustifikasi, dan oleh itu patut diketepikan (lihat ms 12B—C).
- B (4) (Oleh **Mahadev Shankar HMR**) Zainal tidak dicabar oleh perayu atas kejituan catatan dokumen yang dikemukakan. Sebaliknya, rayuan adalah berdasarkan fakta bahawa tiada sijil telah dikemukakan di bawah s 90A(2) yang mana, perayu menghujahkan, bermakna bahawa pihak pendakwa telah gagal membuktikan kesnya. Hujah ini adalah
- C berdasarkan falasi, kerana Zainal bertanggungjawab atas semua pengendalian di bank dan dengan itu adalah bertanggungjawab atas urusan aktiviti bank yang dijalankan oleh komputer tersebut. Sekiranya dia memilih untuk menyediakan suatu sijil, dia boleh berbuat demikian dan di bawah s 90A(2), dokumen-dokumen akan diterima sebagai
- D keterangan seperti yang diperuntukkan oleh s 90A(1). Keterangan viva voce seseorang dalam kandang saksi lebih penting daripada suatu sijil yang dikeluarkan olehnya (lihat ms 13G—I).
- E (5) (Oleh **Mahadev Shankar HMR**) Seksyen 90A(1) merupakan suatu pengemaskinian ‘rukun keterangan paling baik’ dengan realiti zaman elektronik, dan kini ia tidak lagi perlu untuk memanggil juruwang atau kerani bank yang memasukkan data dengan syarat dia berbuat demikian semasa penggunaan biasa komputer (lihat ms 14A—D).
- F (6) (Oleh **Mahadev Shankar HMR**) Hujah perayu bahawa wang klien hilang identitinya apabila digabung dengan wang yang sudah pun berada dalam akaun klien, dan maka pengadu boleh dibayar dengan wang daripada mana-mana akaun klien adalah berdasarkan falasi. Kaedah-Kaedah Akaun Peguamcara 1978 k 3(2) membenarkan seorang
- G peguamcara mengekalkan lebih daripada satu akaun klien, tetapi k 7(a)(i) membenarkan pengeluaran wang seorang klien ‘untuk bayaran bagi atau bagi pihak klien *tersebut*’. Maka, sebarang wang yang diletakkan dalam akaun itu hanya boleh dikeluarkan bagi membayar pengadu atau atas arahan mereka. Penggunaan wang klien untuk menjelaskan liabiliti
- H seorang peguamcara kepada klien lain merupakan satu kesalahan jenayah (lihat ms 15D—E, I dan 16A).]]

Notes

- I For cases on documentary evidence, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 688–789.
For cases on the practice of law, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1495–1526.

Cases referred to

Khoo Hi Chiang v PP [1994] 1 MLJ 265 (refd)
Lyn Hong Yap v PP [1956] MLJ 226 (refd)
Perumal v PP [1970] 2 MLJ 265 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) s 322
Evidence Act 1950 ss 3, 32(b), 60, 90A, 106
Penal Code (FMS Cap 45) s 409
Prevention of Corruption Act 1961
Solicitors' Account Rules 1978 rr 3(2), 7(a)(i)

Appeal from: Criminal Appeal WPRJ No 42–80 of 1993 (High Court, Kuala Lumpur)

Shahul Hameed Amirudin (Albar Zulkifly & Yap) for the appellant.
Mohamed Yusof bin Hj Zainal Abiden (Deputy Public Prosecutor) for the respondent.

Shaik Daud JCA:

The appellant, an advocate and solicitor, was charged on 30 September 1993 before the Kuala Lumpur Sessions Court with two counts of criminal breach of trust. On the first count, he was charged that between 12 June 1987 and 19 May 1988, as an agent – in that in his capacity as the solicitor of the estate of one Tee Seng Pun @ Tee Seng Yeat ('the deceased') and being entrusted with dominion over a sum of RM6,576.16 – he had committed criminal breach of trust of the said sum and had thereby committed an offence under s 409 of the Penal Code (FMS Cap 45) ('the Code'). On the second count, he was charged that between 22 September 1987 and 27 May 1988, being an agent and in his capacity as solicitor of one Ng Ju Hiang, Ng Juey Hong, Tee Yit Hong and the estate of the deceased and being entrusted with dominion over a sum of RM133,000, he had committed criminal breach of trust of the said sum and had thereby committed an offence under s 409 of the Code.

After a lengthy trial, the sessions court convicted the appellant and sentenced him on the first count to imprisonment for 12 months and on the second count to imprisonment for 18 months. The court also ordered the sentences to run concurrently. His appeal to the High Court was dismissed on 21 March 1995, and the court confirmed the convictions and sentences imposed. In addition, the High Court – purporting to act on its own volition under the provisions of s 322 of the Criminal Procedure Code (FMS Cap 6) – ordered the appellant to pay RM10,000 as costs in default of which he shall suffer an additional imprisonment of 12 months. The appellant was eventually released on bail pending appeal to this court.

A The facts of the case are that on 19 September 1991, Ng Ju Hiang, the complainant together with her sister Ng Juey Hong and son Tee Yit Hong were travelling in a taxi driven by her husband Tee Seng Pun. An accident occurred and Tee Seng Pun died and the complainant, her sister and her son were injured. As a result of the accident, the complainant took legal action against the driver of the other vehicle through a firm of solicitors Messrs Tong Teck Yong & Co on 18 October 1983. Eventually, the appellant's firm Messrs PG Segrán & Associates took over the case. The appellant's firm was also involved in making a claim with the Employees Provident Fund ('the EPF'). It is common ground that the firm of Messrs PG Segrán & Associates was wholly owned by the appellant. The case was eventually settled out of court and a consent judgment was recorded by the High Court on 19 May 1987 whereby the court ordered as follows:

- (a) the complainant was awarded RM98,700;
- D** (b) RM8,000 was awarded to the estate of Tee Seng Pun;
- (c) the complainant was also awarded an additional RM11,300 as compensation;
- (d) the complainant's son was awarded RM2,500 as compensation;
- E** (e) the complainant's sister awarded RM2,500 as compensation; and
- (f) costs agreed or to be taxed to plaintiffs.

Following this consent order, Pacific and Orient Insurance Sdn Bhd made four payments to the appellant totalling RM133,000, which included RM10,000 as agreed costs, to be paid over to the plaintiffs as ordered by the court. The amounts were then paid over to the appellant's firm which went into the client's account at the then United Asian Bank. This amount represented the subject matter of the second charge.

G In respect of the first charge, the subject matter was the EPF contribution belonging to the late husband of the complainant. The EPF made a direct payment of RM6,576.16 to the complainant by issuing her a warrant dated 13 October 1986 for the payment. The complainant then deposited this warrant into her savings account at Public Bank Bhd. She then dutifully informed the appellant of this payment. On hearing this, the appellant requested her to hand over the EPF money to him so that he could distribute the same to all the beneficiaries after obtaining letters of administration of the estate of her late husband. Believing the appellant, the complainant then issued him a cheque for the above amount. The appellant should rightly have deposited this amount into the client's account but instead deposited it into his office account at the United Asian Bank Bhd on 12 June 1987.

According to the evidence of the operating officer at United Asian Bank Bhd, the appellant opened the client's account and the office account at the bank on 19 November 1986 and made himself the sole signatory for both the accounts.

According to the witness, from the time the two accounts were opened, the appellant made a number of withdrawals and deposits based on the statement of accounts. He added that on 19 May 1988, when the office account was closed by the bank for violating Bank Negara regulations by issuing bad cheques on at least three occasions within a period of six months, there was left in that account a meagre sum of RM401.02. As for the client's account which was also closed for the same reason on 27 May 1988, there was left also a meagre sum of RM39.69.

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The evidence disclosed that after both the abovementioned accounts were closed, the appellant on 28 November 1988 filed an application by way of a summons in chambers for a distribution order. This application came up before NH Chan J (as he then was) who ordered some amendments to be made to exclude the appellant's firm as one of the beneficiaries. Thereupon, the application was adjourned to another date. Following this, an amended application was indeed filed and the court gave 26 October 1990 as the hearing date. Unfortunately, on that date, no one turned up and the court struck out the application. No application for reinstatement nor a fresh application was filed thereafter.

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In the meantime, the complainant and the other beneficiaries had still not been paid anything even after several enquiries made. Finally, they lost their patience and appointed another firm of solicitors, namely Messrs Lee Pereira & Tan, to take over. After several requests to hand over the relevant files to the new solicitors fell on deaf ears, the complainant was advised to lodge a police report, which she did on 3 September 1991.

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By a letter dated 13 October 1991, the appellant's firm requested the complainant and her sister to call at their office. On 8 November 1991, she and the other beneficiaries presented themselves at the appellant's office where a clerk of the firm gave the following cheques:

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- (a) a cheque dated 1 November 1991 for RM33,183.33 in the name of Ng Ju Hiang as trustee for Tee Yit Hong;
- (b) a cheque dated 1 November 1991 for RM2,500 in the name of Ng Ju Hiang as trustee for Tee Yit Hong;
- (c) a cheque dated 1 November 1991 for RM33,183.33 in the name of Ng Ju Hiang; and
- (d) a cheque dated 1 November 1991 for RM2,500 in the name of Ng Juey Hong.

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They were also given a statement of accounts with three indemnity receipts and an assurance that a cheque for Tee Shee Ping would be sent by post. Apart from the above, they were not paid anything else. There hardly appears to be any dispute of the facts as above presented. There was no dispute of the consent judgment, of the opening of the two accounts, of the receipt of the judgment

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- A sum from the insurance company, of depositing them into these two accounts and of the various withdrawals made from these two accounts and the fact that the accounts were closed by the bank with the meagre sums mentioned earlier remaining in the accounts and of the non-payment from the time of receipt of the money until the closure of the accounts. The main thrust of the argument on behalf of the appellant appears to be solely on the admissibility of the evidence which tend to establish the act of misappropriation, which I will revert to later.

- C The sessions court judge, having been satisfied that a prima facie case had been made out in accordance with the test as expounded by the Federal Court in *Khoo Hi Chiang v PP* [1994] 1 MLJ 265, called upon the appellant to enter his defence on both charges. The appellant elected to give a written statement from the dock and being a lawyer himself obviously understood the consequences thereof. Apart from his written statement, the appellant called no other witnesses and presented no other evidence.

- E The gist of his statement seems to be that firstly, as the solicitor for the complainant he was entitled to keep the entire RM10,000 ordered as agreed costs. Secondly, as for the EPF money, the subject matter of the first charge was by mistake credited into his office account instead of the client's account. He also questioned the amount stated in the second charge as being erroneous. According to him, what the sums mentioned in the consent judgment for him to distribute were only RM98,700 and RM8,000. Finally, he said that the reason why he did not make the payments was because he was waiting for the sealed copy of the distribution order from the court.

- F The sessions court judge found the appellant's defence that he did not make the payments because he was waiting for the distribution order from the court could not be accepted since both the office and the client's accounts at United Asian Bank Bhd had been closed before the appellant made the first application to the High Court for a distribution order. The court found that misappropriation had occurred between the dates the various amounts were deposited in the accounts and the dates the accounts were closed. We have no reason to disagree with the sessions court judge on this. When there is evidence that money entrusted to the appellant and deposited in a bank had been dissipated by him, then the issue of him applying to the court for a distribution order would not constitute any defence, as the money is no longer there to be distributed. We would add that it seems strange that he set up this defence since he did make a payment totalling RM71,366.66 even without any distribution order after the police report had been lodged. This line of defence cannot raise any doubt on the prosecution's case.

I At the hearing of the appeal, although several grounds were put forward, learned counsel En Shahul Hameed abandoned them and argued only on one ground which, according to him, would decide the fate of the whole case. The ground relied upon is the admissibility of the evidence of the bank officer on

the operation of the two accounts at United Asian Bank Bhd and the provisions of s 90A of the Evidence Act 1950 ('the Act').

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It is a fact that the prosecution relied on the evidence of the operations officer of United Asian Bank Bhd (now known as the Bank of Commerce), one Zainal Abidin bin Mohamed ('Zainal') who testified that in 1986, he was the operations officer at the Jalan Masjid India branch of the United Asian Bank Bhd and in that capacity was in charge of the operations of current accounts of the bank. He confirmed that in 1986, the appellant's firm operated an office and also a client's account at the branch. He produced the relevant statements for both accounts as well as pay-in slips, cancelled cheques and other relevant documents showing the opening and operation of these two accounts. It is also not disputed that the prosecution relied on the evidence of this officer to show movements of money from these two accounts from the time of their opening and their final closure to establish that money entrusted to the appellant had been appropriated for his personal use. He also testified and confirmed that the various statements he produced were computer printouts. He also confirmed that the bank closed both the accounts for reasons stated earlier. It must be pointed out that the notes of evidence show that cross-examination of this particular witness was very short and only on the issue of his capacity and ability to identify signatures and nothing else. It is now the submission of learned counsel for the appellant that the whole of the said evidence of this witness is totally hearsay and therefore inadmissible. The prosecution, of course, was relying on the provisions of the newly-added s 90A of the Act which came into force on 16 July 1993 (by Act A851). This section is a special one concerned with the admissibility of documents produced by computers and of statements contained therein. This section reads:

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(1) In any criminal or civil proceeding, a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement.

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While accepting this provision as enabling the prosecution to tender such document or statement, learned counsel submitted that it could only be admitted under s 90A(1) if the prosecution not only proved that such document is produced by a computer but also that it is produced in the course of its ordinary use and in order to do this, it is incumbent upon the prosecution to produce a 'certificate' signed by someone solely in charge of the computer which produced the printout as required by sub-s (2) of s 90A. This subsection provides:

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A (2) For the purposes of this section, it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used.

B He further submitted that failure to produce this certificate is fatal and would render the statement of accounts inadmissible and the evidence of the bank officer hearsay. Therefore, he concluded that since such a certificate was not produced, there is no evidence whatsoever that the printout produced by the
C computer was 'in the course of its ordinary use'.

On reading through s 90A of the Act, we are unable to agree with the construction placed by learned counsel. First and foremost, s 90A which has seven subsections should not be read disjointedly. They should be read together as they form one whole provision for the admissibility of documents produced by computers. As stated earlier, s 90A was added to the Act in 1993 in order to provide for the admission of computer-produced documents and statements as in this case. On our reading of this section, we find that under sub-s (1), the law allows the production of such computer-generated documents or statements if
D there is evidence, firstly, that they were produced by a computer. Secondly, it is necessary also to prove that the computer is in the course of its ordinary use. In our view, there are two ways of proving this. One way is that it 'may' be proved by the production of the certificate as required by sub-s (2). Thus, sub-s (2) is permissive and not mandatory. This can also be seen in sub-s (4) which begins with the words 'Where a certificate is given under subsection (2)'. These words
E show that a certificate is not required to be produced in every case. It is our view that once the prosecution adduces evidence through a bank officer that the document is produced by a computer, it is not incumbent upon them to also produce a certificate under sub-s (2) as sub-s (6) provides that a document produced by a computer shall be deemed to be produced by the computer in
F the course of its ordinary use. It is also our view that the prosecution can tender the computer printout through the investigating officer without calling any bank officer. Therefore, when they adopt this way of proof, then it would be incumbent upon them to establish that the document is produced by a
G computer in the course of its ordinary use by producing the certificate under sub-s (2). The reason seems to me to be obvious as the investigating officer will be in no position to say that the printout is produced by a computer in the
H course of its ordinary use, as he is not an officer of the bank.

In the present case, Zainal – the person in charge of the operations of current
I accounts – testified that the statement of accounts was a computer printout. Therefore, in our view, the first part of sub-s (1) has been proved, ie that the document is a computer printout. It would be superfluous for him to issue a certificate under sub-s (2) when firsthand evidence that 'the document *so were produced by a computer*' was given by Zainal. It would be superfluous to have a

provision such as in sub-s (6) if in every case a certificate must be produced. It follows, therefore, that such a certificate need only be tendered if an officer like Zainal is not called to testify that the statement is produced by a computer. Then the certificate becomes relevant to establish that the document is produced by a computer in the course of its ordinary use. It is our view that when such an officer is not called, the court cannot rely on the deeming provision of sub-s (6). Once the court accepts the evidence of Zainal – and in this case we cannot see any reason whatsoever for the court not to as there was no challenge by cross-examination – the prosecution has succeeded in proving what s 90A(1) requires them to prove: that such document was produced by the computer and in view of the deeming provision of sub-s (6), the second part is also proved.

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Since the appellant relied solely on this one ground, we find no merit in the argument of learned counsel for the appellant that the court should reject the whole of the evidence of Zainal. We find more than ample evidence of misappropriation and the appellant was rightly convicted. Before leaving this appeal, there is one other aspect of this case which we dealt with, ie the order which the High Court made on its own volition in ordering the appellant to pay RM10,000 costs in default of which he was to be imprisoned for a further 12 months. Unfortunately, the learned judge has not mentioned under which provision of the law he purportedly made this order, nor did he mention to whom these costs should be paid. In the light of s 322(3) of the Criminal Procedure Code (FMS Cap 6), it is our view that this additional order is not justified, and we therefore set it aside.

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For the above reasons, we would therefore dismiss this appeal.

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Mahadev Shankar JCA:

I have read the judgment of my brother Shaik Daud JCA with which I am in complete agreement. We were unanimous in our decision to dismiss this appeal. Nevertheless, since the learned deputy public prosecutor has specifically requested us for guidance on how s 90A of the Evidence Act 1950 ('the Act') should be applied, I wish to add a few words of my own on this aspect of the case.

G

The evidence relating to the entire history of the operations of the accused's bank accounts with the Bank of Commerce ('the bank') was given by PW10, En Zainal Abidin bin Mohamed ('Zainal'). When he testified on 18 August 1993, he was an executive officer at the bank's head office in Jalan Tun Perak. The offences charged were alleged to have occurred between 12 June 1987 and 27 May 1988 ('the relevant period') and took place in the bank's branch office at Jalan Masjid India ('the branch').

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Zainal's evidence-in-chief so far as is relevant to this aspect of the case was as follows. From 1986, he was the officer-in-charge of all the branch operations including the conduct of current accounts. In other words, to use the relevant

A words from s 90A(2) of the Act, he was the person who was responsible 'for the conduct of the activities for which that [branch] computer was used' during the relevant period.

On 19 November 1986, the accused opened a current account at the branch. Although Zainal did not personally handle this transaction, he was the branch officer responsible for verifying the accused's signature on all documents throughout the accused's relationship with the branch and was very familiar with the accused's signature. The opening form produced (exh P41) was the original. It contained the accused's particulars and his signature. It was designated 'client's account'. The computerized entry on this document gave details of the bank's code, the account number and the date. These were identified by Zainal.

The RM133,000 which was the subject matter of the second charge was paid into this account in four instalments of RM33,250 each on 22 September 1987, 19 October 1987, 18 November 1987 and 27 November 1987. The original pay-in slips for each of these payments were produced. Each of these contained a computerized entry confirming that the branch had received these amounts. Photocopies of the cheques in favour of the accused were also produced which matched the pay-in-slips.

E Zainal also produced the branch *office copies* of the monthly statements of this client's account from the day it was opened on 19 November 1986 up to the date it was closed on 27 May 1988 because three of the accused's cheques were dishonoured within six months. The monthly statements were generated by the branch computer. The closing balance was RM39.69. The four instalments aforesaid were reflected in the credit columns of these monthly statements against the dates on the pay-in slips.

After dealing systematically with each pay-in slip, the relevant cheque and the corresponding credit entry in the monthly statement, Zainal produced the cheques which the accused had drawn on this client's account. There were 51 transactions. Forty-four cheques were originals. Four had been 'referred to drawer'. Three had been lost in the course of the bank's renovation. Zainal personally identified the accused's signature on all the cheques produced.

H With reference to the RM6,576.16 in the first charge, Zainal testified that the accused had opened an office account with the branch on 19 November 1986. As with the client's account, Zainal produced the original account opening form with the accused's signature and 14 computer-generated monthly statements (ie the office copies) from 28 May 1987 up to 19 May 1988 when the account was also closed because three cheques were dishonoured within six months. The significance of these dates is that instead of paying the RM6,576.16 into his client's account as he was bound in law to do, the accused paid the money into his office account on 12 June 1987. The original pay-in slip was produced with the computer entry confirming receipt (exh P51). The complainant had earlier identified the Public Bank cheque for this amount

which she handed to the accused. Zainal also produced 135 cheques which the accused had drawn on this account, leaving a closing balance of RM401.02. All the cheques matched the entries in the monthly statements.

A

Zainal was not challenged by defence counsel on the accuracy of the entries in the documents produced. It was only on appeal that a point was raised that because a certificate was not produced under s 90A(2), the prosecution had failed to prove its case.

B

The fallacy of this submission is easily demonstrated. Zainal was the branch officer in charge of all the operations of the branch. He was therefore responsible for the conduct of the activities of the branch for which the computer was used. If he chose, he could have issued a certificate as required by s 90A(2) and without his actual presence, all the computer-generated documents would have been admitted in evidence as provided by s 90A(1). The viva voce evidence of the man in the witness box counts for more than a certificate issued by him.

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There is a parallel here with 'consents to prosecute' which are required under the Prevention of Corruption Act 1961. If a deputy public prosecutor is present and goes on record when the accused is called upon to plead to an offence under this Act, no separate consent should be required (see *Lyn Hong Yap v PP* [1956] MLJ 226 and *Perumal v PP* [1970] 2 MLJ 265).

E

We need to remind ourselves that s 90A was enacted to bring the 'best evidence rule' up to date with the realities of the electronic age. Receipts for payments in and records of payments out of a bank account are keyed in by the tellers into the terminals at the counter, and the information is electronically stored in the bank's computer. The information so stored is not in itself visible to the naked eye. To become visible, the raw data has to be projected on a video display unit and/or printout. So the definition of a 'document' in s 3 of the Act now provides that both the display on the video display unit and the printout qualify as documents. The last two items in the Illustrations to the section have spelt this out.

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The effect of s 90A(1) in the present scenario is that it is no longer necessary to call the actual teller or bank clerk who keyed in the data to come to court provided he did so in the course of the ordinary use of the computer.

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This is a relaxation of the direct evidence rule in s 60 of the Act beyond the extent to which its provisions have been diluted by s 32(b) in the case of document made in the ordinary course of business. A situation could thus arise under s 90A(1) where the particular person who keyed in the information may not be individually identifiable, but the document would nevertheless be admissible.

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Zainal gave evidence that the office copies of the monthly statements and the various other documents tendered by him had been handed to the police when the investigations were under way. Ordinarily, a document would only be

- A** admissible as evidence of the facts it contains if the record and the event recorded are contemporaneous. Section 90A(6) also relaxes this requirement. The contemporaneous document here is the data keyed in at the time of the transaction. The printout is only a process of retrieval. By s 90A(6), this retrieval can come after investigation or even after the trial has begun.
- B** It is not necessary for me to say anything here about the far-reaching effects of ss 90B and 90C of the Act. The accused did not dispute that he received the money which was the subject of the charges, that they were paid into these accounts and that he failed to pay them over to his clients despite numerous demands.
- C** The charges against the accused were conclusively proved. In the case of the first charge, the conversion took place as soon as the cheque was paid into the accused's office account because in effect he put the money into his own pocket. As for the second charge, even if the accused had a good reason for delaying payment (and in my view he had none), conversion was conclusively proved when the total amount in the client's account shrank below the total amount due to the complainants.
- D** When the second instalment of RM33,250 was paid in on 19 October 1987, the total credit balance was RM157,258.79, of which RM66,500 belonged to the complainants. On 17 November 1987, the total credit balance had shrunk to RM5,246.79. The only inference from this is that out of the complainants' RM66,500, the accused had converted RM61,253.21 to his own use by that day. The third and fourth instalments were paid in on 18 November and 27 November 1987. On this day, the total credit balance after these payments was RM68,496.79. It should have been at least RM133,000 on the assumption that the complainants were the only clients left whose money had not yet been paid out of this account. Thereafter, the total credit balance progressively shrank to RM39.69. The only inference is that since 17 November 1987, the accused dissipated the third and fourth instalments also.
- E**
- F**
- G** We must now deal in depth with another submission advanced by En Shahul Hameed on behalf of the accused because if this submission represents the thinking of even a small segment of the legal profession, it must be corrected immediately.
- H** The submission originated from the concept that once the complainants' money was paid into the accused's client's account, it lost its individual identity and merged with the total balance in the client's account. Since a solicitor could maintain more than one client's account in one or more banks, it was submitted that even if the amount in the bank client's account was not enough to meet his liabilities to the complainants, the accused would have not committed any offence if there were enough money in these other accounts which the accused could have used to pay the complainants. There was no evidence that any such other accounts ever existed. Nevertheless, it was contended that since the prosecution had not shown that the accused did not
- I**

have client's accounts other than the one in the bank and that these other accounts did not contain funds in excess of the subject matter of the charges, the prosecution had failed to prove its case.

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My first response to this is that the prosecution cannot be expected to prove a negative. All it needed to show was that the complainants' money had been paid into a particular account and that that money had been converted. The contention that there was another client's account where other money was being kept in reserve to meet this liability goes to defence and s 106 of the Act applies. That burden is on the accused because it is a fact specially within his knowledge. The cases are all listed in the Consolidated Subject Index of the Malayan Law Journal 1932–1991 at pp 551–552.

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Would it have helped the accused if he had led evidence to show that he had other client's accounts where individually or cumulatively the credit balance therein had exceeded RM133,000? The accused and En Shahul Hameed obviously thought so. It has therefore become necessary to disabuse both of them and anybody else who holds this view that this emphatically is *not* so.

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Whilst r 3(2) of the Solicitors' Account Rules 1978 permits a solicitor to maintain more than one client's account, r 7(a)(i) only permits the withdrawal of a client's money 'for a payment to or on behalf of *the* client'.

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The complainants' money (RM133,000) was paid into the bank client's account. The effect of r 7(a)(i) is that this money could only be taken out to pay the complainants or to their order. To use one client's money to settle a solicitor's liability to some other client is a criminal offence. A client's account in Bank A is impressed with a trust only for all those individual clients whose money has been deposited there (say X, Y and Z). Another client's account in Bank B may contain the moneys of clients L, M and N. A solicitor who removes money from Bank B in this example to pay a client in Bank A does so at his peril.

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In conclusion, I would observe that the accused abused the trust reposed on him and got what he richly deserved. What we urgently need to do is to inquire why the existing sanctions have failed to deter this kind of miscreant and whether more aggressive measures should be instituted.

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Abdul Malek Ahmad JCA:

I have read the judgments of my learned brothers Shaik Daud and Mahadev Shankar JJCA and agree with the reasoning expressed therein. The whole appeal rested on the construction of s 90A of the Evidence Act 1950 and whether one applies logic and common sense or the basic rules of legislative

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A interpretation, the finding of my learned brother judges appears to be the only conclusion that can be reached as regards the effect of the said section. The appeal is accordingly dismissed.

Appeal dismissed.

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Reported by K Tang-Wai

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